In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-863

TRIPLE A MACHINE SHOP, and MISSION EQUITIES INSURANCE GROUP,
Petitioners,

vs.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, and OCTAVIO CORDERO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

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No.

TRIPLE A MACHINE SHOP, and MISSION EQUITIES INSURANCE GROUP,
Petitioners,

VS.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, and OCTAVIO CORDERO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

Petitioners Triple A Machine Shop and Mission Equities Insurance Group pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on August 29, 1978.

OPINION BELOW

The decision of the Administrative Law Judge, not officially reported, is attached hereto as Appendix A. The

opinion of the Benefits Review Board, not officially reported, is attached hereto as Appendix B. The opinion of the United States Court of Appeals for the Ninth Circuit, affirming the decisions of the Administrative Law Judge and the Benefits Review Board, is reported at 580 Fed.2d 1331 and is attached hereto as Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals was entered on August 29, 1978. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Did the Court below err in holding that economic disability and notice to the employer of the employee's impairment must be found before the provisions of § 8(f) of the Longshoremen's and Harbor Workers' Compensation Act can be applied? The holding of the Court of Appeals for the Ninth Circuit is directly opposed to decisions rendered by the Courts of Appeal for the Third Circuit, Fifth Circuit, and District of Columbia Circuit.

2. Did the Court below err in assessing full liability on the last carrier (last three days of employment out of a thirty year period of employment)?

STATUTES INVOLVED

The statute involved herein is the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1425, as amended, 33 U.S.C. § 901, *et seq.* Particularly involved herein is the interpretation to be given to the provisions

of § 8(f) of the Longshoremen's and Harbor Workers' Compensation Act which is set forth as follows:

> "(f) Injury increasing disability: (1) If an employee receives an injury which of itself would only cause permanent partial disability but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subsequent injury: *Provided, however,* That in addition to compensation for such permanent partial disability, and after the cessation of the payments for the prescribed period of weeks, the employee shall be paid the remainder of the compensation that would be due for permanent total disability. Such additional compensation shall be paid out of the special fund established in section 944 of this title." 33 U.S.C. § 908(f).

STATEMENT OF THE CASE

Respondent Octavio Cordero was a 53-year-old welder on his last day of work on October 19, 1972. He had been regularly employed as a welder for approximately 30 years. Triple A Machine Shop was Respondent's employer on October 16, 17, 18 and 19, 1972. The facts show that Respondent had been suffering from the effects of a bronchial asthmatic condition with chest symptomatology since 1967. On October 16, 1972, Respondent obtained employment with Petitioner Triple A Machine Shop through his normal union hall affiliation but he was too sick to report for work

on that day because of a "chest cold". However, Respondent worked for Triple A Machine Shop for the following three days, terminating his employment on October 19, 1972. Respondent has not worked since that date.

Respondent's testimony indicated that he had been a regular smoker (a pack a day) since his teen-age years and that he stopped smoking on the advice of doctors. He suffers from asthma and is allergic to feathers, birds, animals and house pets. Claimant has had chronic cough since about 1967.

Of particular significance is the fact that the claimant experienced shortness of breath and began to restrict his activities in 1970 while working for a different employer, Pacific Ship Repair.

Respondent's testimony further indicated that he was called for work through his union hall on Monday, October 16, 1972, but that he was too sick to report even though he had been off work for approximately two months.

Although industrial causation is not here presented as an issue, the medical evidence received at trial was divided. The physician employed by Respondent Employee indicated that cigarette smoking was the basic cause of his pulmonary impairment although he found the inhalation of welding fumes to be an aggravating cause of the impairment. Petitioner's physician indicated that the inhalation of welding fumes caused only a temporary aggravation of the employee's condition and did not contribute to permanent impairment.

The Administrative Law Judge rejected Petitioner's contention that § 8(f) should be applied and found that the record did not support a contention that the employee was

disabled in an economic sense prior to the injury which gives rise to this litigation. The Administrative Law Judge's holding was upheld by the Benefits Review Board, whose decision was in turn affirmed by the Court of Appeals for the Ninth Circuit. It is respectfully submitted that the Administrative Law Judge, Benefits Review Board, and the Court of Appeals for the Ninth Circuit relied on the concept of "economic disability" which is not an accurate expression of the law on this particular issue.

REASONS FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED IN THIS CASE IN ORDER TO RESOLVE A CONFLICT AMONG THE CIRCUITS.

The Court of Appeals for the Ninth Circuit in the case under consideration herein failed to apply the provisions of § 8(f) of the Longshoremen's and Harbor Workers' Compensation Act in which the employer and carrier attempted to limit their liability to 104 weeks of disability payments. In rejecting Petitioner's argument that § 8(f) should be applied, the Court relied on the case of *Dillingham Corp. v. Massey,* 505 F.2d 1126 (9th Cir. 1974) which required that an underlying condition be made manifest to an employer before the provisions of § 8(f) could be applied. The fact that the employee suffered from a pre-existing impairment is conclusively proved by his inability to report for work on the first day of the job. In addition, the employee's testimony indicated that he had experienced chest symptomatology from and after 1967 and that he had begun to restrict his occupational activities in 1970.

More persuasive, however, are the following recent decisions which hold that the proper test of the applicability of § 8(f) is prior *physical* disability rather than *economic* disability.

Atlantic & Gulf Stevedores, Inc. v. Director, Office of Workers' Compensation Programs, (Aleksiejczyk), 542 F.2d 602, 608 (3d Cir. 1976);

C & P Telephone Company v. Director, Office of Workers' Compensation Programs, 564 F.2d 503 (D.C. Cir. 1977);

Equitable Equipment Company v. Hardy, 558 F.2d 1192, 1198 (5th Cir. 1977);

Director, Office of Workers' Compensation Programs (DeNichilo) *v. Universal Terminal & Stevedore, Inc. Corp.,* 575 F.2d 452 (3d Cir. 1978).

The resolution of the conflicting law of the Circuit Courts is considered critical to maritime contractors since stevedores and shipbuilding and repair contractors, especially those in the Ninth Circuit, cannot be certain of their obligations with regard to determining the nature of an employee's pre-existing impairment (physical or economic) and the degree of notice, if any, of the pre-existing impairment to the 104 week limitation of payments described in § 8(f) of the Longshoremen's and Harbor Workers' Compensation Act. Should the Ninth Circuit view prevail (economic impairment), it will be necessary for employers to conduct pre-employment physicals, thereby undermining the present union hall referral of workers. The interpretation of § 8(f) set forth by the Third, Fifth, and the District of Columbia Circuits would require the existence of a prior physical impairment in order to entitle the employer to limit liability

to 104 weeks. It must be kept in mind that no detriment would be caused to the injured worker since he would continue to draw full benefits from the Special Fund.

II. ASSESSMENT OF FULL LIABILITY AGAINST THE LAST CARRIER IS DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Petitioners herein ask this Honorable Court to take a fresh look at the "last carrier" rule which was established in the case of *Travelers v. Cardillo,* 225 F.2d 137 (2d Cir. 1955), *Cert. denied* 350 U.S. 913, 100 L.Ed. 800, 76 S.Ct. 196.

It is acknowledged that the existing law in occupational disease cases would assess full liability on the last carrier during the period of injurious exposure. Admittedly, the employee herein was employed for the last three days of his working life by Triple A Machine Shop, insured by Mission Insurance Company.

It must be recognized that the "last carrier" rule was adopted on the basis of "administrative feasibility".

Petitioners respect the twofold purpose of the "last carrier" rule, namely to provide a workable and an administratively feasible system to effectuate the beneficial purposes of the Longshore Act. However, it is submitted that excessive financial burdens cannot equitably be placed on compensation carriers under the guise of administrative feasibility.

The financial impact and burdens to be placed on stevedores and maritime contractors cannot be underestimated. The employee herein was 53 years of age at the time of injury. Assuming disability were to be assessed at the maxi-

mum compensation rate available at the present time ($396.78 per week), and further assuming a life expectancy of another 21 years, the employee would ultimately receive approximately $433,000.00 as the result of his three days of exposure with this employer during a thirty year working history. It is respectfully submitted that due process is denied where the procedure tends to shock the sense of fair play.

Howard v. U.S., 372 F.2d 294 (9th Cir. 1967), *Cert. denied* 388 U.S. 915, 18 L.Ed.2d 1356, 87 S.Ct. 2129.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a Writ of Certiorari be granted to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Dated, San Francisco, California,
November 28, 1978.

Respectfully submitted,

DALE E. FREDERICKS
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& ARNOLD
Attorneys for Petitioners.

Of Counsel:
GERALD A. FALBO

(Appendices Follow)

Appendices

APPENDIX A

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Washington, D.C. 20210

Case No. 75-LHCA-153
OWCP No. 13-23438

In the Matter of
OCTAVIO A. CORDERO
Claimant

vs.

TRIPLE "A" MACHINE SHOP
Employer

MISSION EQUITIES INSURANCE GROUP
Carrier

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and Carrier

Before: John W. Earman
Administrative Law Judge

DECISION AND ORDER

Statement of the Case

This is a claim for compensation under the provisions of the Longshoremen and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901, *et seq.* Claimant contends that he is totally disabled due to breathing welding fumes and that the last exposure to the fumes was in his employment with the Triple "A" Machine Shop on October 19, 1972. Respondent contends that Claimant is not totally disabled as a result of his employment with the Triple "A" Machine Shop and that Claimant was significantly disabled prior to the acceptance of the last employment. Respondent also contends that in the event of a finding of a compensable injury, the last carrier should be entitled to contribution from other employers. The Solicitor of Labor filed a brief advocating denial of apportionment of liability and denial of liability of the special fund for any portion of Claimant's disability.

This matter came on for hearing before Samuel J. Smith, Administrative Law Judge, on January 13, 1975. Respondents moved for a continuance, which was granted, and then moved for a joinder of former employers as additional parties which was granted by Judge Smith in his Order of January 16, 1975. At the hearing on April 9, 1975, United States Steel Corporation and Bethlehem Steel Corporation were dismissed as parties, the remaining former employers failed to appear. The Monolith Portland Cement Company filed a motion to dismiss it as a party subsequent to the hearing, as did the Coastal Marine Engineering Company.

Finding of Facts

Claimant, who is 55 years old, had worked as a welder since 1942 for various employers. He testified that he has had a chronic cough since the late 1960's and a shortness of breath since 1970. Since 1970, he has slowed his activities. Claimant had worked for Triple "A" Machine shop, a ship repairer, on several occasions over the years. He worked there from May, 1972 to August, 1972, at which time he was laid off for lack of work. Triple "A" recalled Claimant on Ocbtoer 16, 1972 but he was unable to go to work because he felt as if he has a chest cold. On the 17th of October he did return to work and worked until October 19, when he was no longer able to work. Claimant has not been gainfully employed since that time although he has done some work around the house.

Dr. Anthony Cosentino, a chest specialist, said that he first saw Claimant on November 22, 1972, when he was referred by Dr. Mustacchi because of a positive tuberculin skin test. The doctor said that Claimant had never had tuberculosis and his condition is in no way related to the tubercle bacilli in his body. In the history Claimant gave the doctor he said that he had some cough and wheeze dating back ten or fifteen years but no evidence of allergies. After testing, Dr. Cosentino concludes that Claimant has obstructed airways for which he makes a liberal use of the term asthma. The doctor said that cigarette smoking and exposure to oxides of nitrogen as a result of welding, is the cause of Claimant's condition. The doctor concludes that Claimant has a fibrous reaction in the small airways of the lung, which was, in part, reversible, but Claimant has now reached a plateau. Physical exertion

brings on Claimant's condition and the doctor thinks his ability to work in even a sedentary job is restricted to isolated days. The doctor said that Claimant is steroid dependent and must stay on medication. On cross-examination Dr. Cosentino pointed out that there was certainly acute aggravation of Claimant's condition in his last employment but the doctor could not specifically put a percentage on the amount of Claimant's permanent condition which resulted therefrom.

Dr. Cosentino thought, because of treatment, Claimant is better than at the time he last worked in October, 1972. The doctor thought the basic cause of Claimant's problem was cigarette smoking with exposure to welding fumes an aggravating factor, but he had no way to determine the degree of fault for each factor and could not say that exposure to welding fumes contributed less than 50 per cent to Claimant's condition. Claimant would not be disabled today if he had not worked as a welder, according to Dr. Cosentino.

Dr. Raymond P. Collins, internist, after examining Claimant on January 28, 1974 and reviewing medical reports, concluded that Claimant suffers from chronic bronchitis and chronic obstructive lung disease. The doctor is of the opinion that Claimant's asthmatic bronchitis developed in a susceptible individual as the result of longstanding cigarette smoking and prior infections. While it is possible that exposure to dust or fumes in the course of his employment caused temporary exacerbation of symptoms, the doctor points out that severe exacerbation of symtoms resulting in disability developed at a time when he had not worked for two months.

Dr. Collins found Claimant to be substantially disabled with respiratory symptoms and the need for medication, however, he could do considerable physical work as shown by his work around his home in replacing the roof and installing wallboard. Claimant's condition has been developing over the years, according to the doctor, and the condition would have progressed substantially as it did, regardless of Claimant's activities. Dr. Collins testified that inhaling welding fumes contributed to some extent to permanent irritation or damage but part of the irritation was temporary and went away.

Dr. Paul L. de Silva examined Claimant on April 6, 1973. In his written report the doctor was of the opinion that many things other than his work as a welder affected Claimant's bronchitic asthma as evidenced by the fact that he was unable to work on October 16, 1972. The doctor was of the opinion that three subsequent days of work may have increased Claimant's respiratory tract problem for a few weeks, at most, following which he receded to his pre-working level which, in itself, was so severe as to render him unable to carry on in any job that required physical exertion or exposure to irritants.

Claimant's average weekly wage must be computed under Section 10(c) of the Act (33 U.S.C. 910(c)) since we have no information as to whether Claimant worked five or six days a week and the periods he was unemployed due to lack of work. In the first 42 weeks of 1972, Claimant earned $4,891.11 for an average weekly wage of $116.45 which would entitle him to compensation at the rate of $70.00 per week.

Counsel for Claimant is entitled to a reasonable fee for legal services performed on behalf of Claimant and Dr.

Cosentino is entitled to a fee as an expert witness. The following medical expenses were incurred by Claimant in connection with his condition:

University of California Hospitals	$2,353.88
St. Mary's Hospital	24.00
Valencia Pharmacy	72.30
Dr. Mustacchi	164.10
Dr. Cosentino	256.00

Conclusions of Law

1. Former employers, except the last employer, are not proper parties to this claim.

It is well settled that the employer during the last employment in which the Claimant was exposed to injurious stimuli prior to becoming aware of an occupational disease is liable for the full amount of the award. *Travelers Insurance Co. v. Carbillo*, 225 F. 2d 137 (2nd Cir. 1955), *cert. denied sub nom, Ira S. Bushey & Sons, Inc. v. Cardillo,* 350 U.S. 913 (1955). The continuing viability of the *Cardillo Rule* has been recognized by the Benefits Review Board in decisions including *American Insulation Co. v. Walter,* BRB No. 73-102 (Aug. 7, 1973); *Independent Stevedore Co. v. Massey,* BRB No. 73-117 (Jan. 29, 1974); *Warren v. Jacksonville Shipyards, Inc.,* 1 BRBS 184, BRB No. 74-144 (Nov. 13, 1974). In review of the above decisions all former employers, except the Triple "A" Machine Shop, must be dismissed as proper parties to this action.

2. Claimant has been totally and permanently disabled since October 20, 1972 as a result of breathing fumes in connection with his employment.

Under the Act, disability is an economic concept based upon a medical foundation. *Offshore Food Services, Inc. v. Murillo,* 1 BRBS 9, BRB No. 73-141 (May 15, 1974); *American Mutual Insurance Co. of Boston v. Jones,* 426 F. 2d 1263 (D.C. Cir. 1970). The degree of disability cannot be measured by physical condition alone, but consideration must be given to Claimant's industrial history and the availability of the type of work he can do. *American Mutual Insurance Co. of Boston v. Jones, supra.* The burden is on the employer to establish that a claimant who proves he is unable to perform the duties of his regular employment has actual opportunities to obtain other work. *Perini Corp. v. Heyde,* 306 F. Supp. 1321 (D. R.I. 1969); Larson, Workmen's Compensation Law, Vol. 2, Sec. 57.61.

It is undisputed that Claimant can never return to work as a welder or that his last working day was October 19, 1972. The evidence is also clear, Dr. Collins notwithstanding, that Claimant is not able to engage in any employment that requires physical exertion. The record does not show any employment which Claimant is capable of performing or the availability of such employment. Therefore, Claimant is clearly disabled under the Act and that disability is permanent in nature.

In determining the connection between Claimant's condition and his work, greater weight is given to the testimony of the treating physician, Dr. Cosentino, than to the testimony and reports of examining doctors, Drs. Collins and de Silva. Dr. Cosentino said that Claimant's obstructive lung disease results from both smoking and exposure to welding fumes. On the other hand, Dr. Collins testified that the condition would have progressed substantially as

it did regardless of exposure to the fumes, but he did concede that inhaling welding fumes contributed to some extent to permant irritation or damage to Claimant's respiratory system. Even under Dr. Collins' evaluation Claimant would prevail because the aggravation of a pre-existing condition requires that the entire resulting disability be compensable. *Nolan* v. *Ingalls Shipyard Corp.*, 1 BRBS 141, BRB No. 74-127 (Oct. 11, 1974); *Vozzolo* v. *Britton*, 377 F. 2d 144 (D.C. Cir. 1967). Dr. de Silva's evaluation is not found to be creditable.

The evidence is not disputed that Claimant was exposed to welding fumes while employed by Triple "A" Machine Shop on October 17, 18, and 19, 1972. The employer during the last employment in which a claimant is exposed to injurious stimuli is liable, even if the exposure was only for one day. *McCabe* v. *Sun Shipping and Dry Dock Co.*, 1 BRBS 509, BRB Nos. 74-193-193i (June 4, 1975).

3. The Special Fund is not liable for any portion Claimant's disability.

If we understand Respondents' argument that Claimant was disabled prior to his last employment as an attempt to bring the case within the meaning of Section 8(f) of the Act (33 U.S.C. 908(f), it fails to do so. In addressing the "second injury fund" question the Benefits Review Board in Burke v. Metropolitan Stevedore Co., 2 BRBS 94, BRB No. 74-207 (July 18, 1975) has said:

> "The term "disability," as it is used in Section 8(f), includes both an employment-related disability and one unrelated to employment. *Lawson v. Suwanee Fruit and Steamship Co.*, 336 U.S. 198 (1949). However, in construing the term "disability" as it is used in Section 8(f), it has been held that "disability" is an economic and not a medical concept. *American Mutual Insurance Co. of Boston v. Jones*, 426 F. 2d 1263 (D.C. Cir. 1970). The record does not support a contention that the claimant was disabled in an economic sense prior to the injury which gave rise to this case. Prior physical infirmities suffered by the claimant are merely pre-existing conditions, not previous disabilities, so that Section 8(f), limiting the employer's liability for payment of compensation, does not apply. *Shillington v. W. J. Jones and Son, Inc.*, 1 BRBS 191, BRB Nos. 74-128 and 128A (Nov. 12, 1974); *Aleksiejczyk v. Atlantic and Gulf Stevedores, Inc.*, 1 BRBS 541, BRB No. 74-202 (June 16, 1975); *Fulton v. Nacirema Operating Co., Inc.*, 2 BRBS 41, BRB No. 75-211 (June 30, 1975).

ORDER

1. *IT IS HEREBY ORDERED,* that all former employers of Octavio A. Cordero, except the Triple "A" Machine Shop, Inc., be dismissed as respondents in this action.

2. *IT IS FURTHER ORDERED,* that the Triple "A" Machine Shop, Inc. and the Mission Equities Insurance Group pay to the Claimant, Octavio A. Cordero, compensation for permanent total disability at the rate of $70.00 per week commencing on October 20, 1972 and shall continue payment of compensation at said weekly rate during the continuance of such disability, subject to the provisions and limitations of the Act. Credit shall be given for amounts advanced to Claimant and the remainder shall be paid in a lump sum with interest at the rate of 6% per annum from the date each installment was due until finally paid.

3. *IT IS FURTHER ORDERED,* that the Employer and Carrier pay to the Claimant, in addition to the compensation awarded, the sum of $2,870.28 for medical services and medication in connection with the injury.

4. *IT IS FURTHER ORDERED,* that a fee in the amount of $1,600.00 shall be paid by the Employer and Carrier directly to the attorney for the Claimant, Kathryn E. Ringgold, which fee includes the amount of $200.00 to be paid by the attorney to Dr. Anthony M. Cosentino as an expert witness fee.

/s/ JOHN W. EARMAN
JOHN W. EARMAN
Administrative Law Judge

Dated: November 18, 1975
Washington, D. C.

APPENDIX B

U.S. DEPARTMENT OF LABOR
Benefits Review Board
Washington, D.C. 20210

BRB No. 76-113

OCTAVIO A. CORDERO
Claimant-Respondent

vs.

TRIPLE A MACHINE SHOP

and

MISSION EQUITIES INSURANCE GROUP
Employer/Carrier-Petitioners

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Party in Interest

[Filed August 13, 1976, Benefits Review Board]

DECISION

Appeal from the Decision and Order of John W. Earman, Administrative Law Judge, United States Department of Labor.

Kathryn P. Ringgold (Airola & Ringgold), San Francisco, California, for the claimant.

Gerald A. Falbo (Sedgwick, Detert, Moran & Arnold), San Francisco, California, for the employer/carrier.

Harry L. Sheinfeld (William J. Kilberg, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D. C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: Washington, Chairperson, Hartman and Miller, Members.

Washington, Chairperson:

This is an appeal by the employer/carrier from a Decision and Order (75-LHCA-153) of Administrative Law Judge John W. Earman pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (hereafter referred to as the Act).

Claimant worked as a welder from 1942 to 1972. During this time, he was often exposed to noxious fumes while on the job. On occasion, due to the fact he was working in tight quarters aboard ship, he was unable to wear protective gear. Claimant worked for employer from May 1972 to August 1972 and from October 17, 1972, to October 19, 1972. He was unemployed during that interim period. Claimant has not worked since October 20, 1972, due to severe asthmatic bronchitis. The administrative law judge found this breathing condition was causally related to his employment. He also found claimant to be permanently totally disabled. Benefits were awarded accordingly.

Employer/carrier(hereafter, the employer) appeals contending that the administrative law judge's determination that claimant's disability is causally related to his exposure to welding fumes is not supported by substantial evidence,

that the assessment of benefits for permanent total disability against an employer who only employed claimant for four months constitutes a deprivation of property without due process of law, and that the administrative law judge should have apportioned liability to the special fund.

Section 21(b)(3) of the Act, 33 U.S.C. § 921(b)(3), and the law as summarized in *O'Keeffe v. Smith Associates,* 380 U.S. 359 (1965), require the Board to affirm a decision when it is supported by substantial evidence, is not irrational, and is in accordance with law.

Dr. Cosentino, a chest specialist, testified that claimant's condition is caused by a history of cigarette smoking combined with his exposure to noxious welding fumes over a period of time including the time he worked for employer. The administrative law judge relied on this testimony. The fact finder's evaluation of the credibility of witnesses, including medical witnesses, must be respected by this Board. *John W. McGrath Corp. v. Hughes,* 289 F.2d 403 (2d Cir. 1961). As it is well established that it is enough that an accident either aggravate, accelerate or combine with a disease or infirmity for there to be a compensable injury under the Act, *J. V. Vozzolo Inc. v. Britton,* 377 F.2d 144 (D.C. Cir. 1967); *Independent Stevedore Co. v. O'Leary,* 357 F.2d 812 (9th Cir. 1966), the administrative law judge's finding that claimant's permanent total disability is a result of exposure to welding fumes is supported by the record and is in accordance with law.

The Board also finds that the administrative law judge's determination that employer is responsible for all the payments for permanent total disability was proper.

Claimant worked for employer for approximately four months and during this time, he was exposed to injurious stimuli. In *Travelers Ins. Co. v. Cardillo,* 225 F.2d 137 (2d Cir. 1955), *cert. denied sub nom., Ira S. Bushey & Sons, Inc. v. Cardillo,* 350 U.S. 913 (1955), the Court concluded:

> that the Congress intended that the employer during the last employment in which the claimant was exposed to injurious stimuli . . . should be liable for the full amount of the award.

Any different approach would lead to administrative and judicial complications, especially in this case where claimant had 18 former employers with differing periods of employment and degrees of exposure. Any attempt by the last employer to seek contribution from prior employers would lead to a proliferation of hearings directed at determining whether any part of claimant's condition was caused by them. Further, a jurisdictional analysis would have to be made for each employer. Employer's argument that the *Cardillo* rule should be reexamined as there was formerly a pre-amendment $24,000 limit on liability is erroneous. The $24,000 limit on liability in the unamended Act did not apply to cases of permanent total disability. 33 U.S.C. § 914(m).

The Board also rejects employer's argument that the administrative law judge should have apportioned liability to the special fund. 33 U.S.C. § 908(f). In order that Section 8(f) apply, one of the things that is required is that any pre-existing disability be manifest to the employer at the time of hiring. *Love v. Bender Welding & Machine Co.,* 3 BRBS 183, BRB No. 75-231 (Jan. 23, 1976). There is nothing in the record to indicate that employer was aware of

claimant's breathing condition at the time he was hired either in May 1972 or October 1972. Even if the condition was manifest at the time he was rehired, the record indicates claimant was already permanently totally disabled due to injurious stimuli incurred during his prior work with employer. Section 8(f) would be inapplicable in this situation. Section 8(f) is directed at encouraging an employer to hire individuals who although handicapped can perform the duties required by the employer. *Love v. Bender Welding Machine Co., supra.* The policy behind Section 8(f) is not served and its monetary relief should not be available to an employer who rehires an individual who cannot possibly perform the tasks assigned to him because he is already permanently totally disabled by his prior work with the same employer.

Accordingly, the Decision and Order of the administrative law judge is affirmed.

/s/ RUTH V. WASHINGTON
Ruth V. Washington, Chairperson

We Concur: /s/ RALPH M. HARTMAN
Ralph M. Hartman, Member

/s/ JULIUS MILLER
Julius Miller, Member

Dated this 13th day
of August, 1976

SERVICE SHEET

BRB No. 76-113: Octavio Cordero v. Triple A Machine Shop and Mission Equities Insurance Group
(Case No. 75-LHCA-153)

Copies of this letter have been sent to the following parties:

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APPENDIX C

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 76-3206

Octavio Cordero and Director Office of Workers' Compensation Programs, United States Department of Labor,
Respondents,

vs.

Triple A Machine Shop and Mission Equities Insurance Group,
Petitioners.

[Filed August 29, 1978]

On Petition for Review of an Order
of the Benefits Review Board
United States Department of Labor

Before: CHAMBERS, KILKENNY and HUG, Circuit Judges.
KILKENNY, Circuit Judge:

This is a petition for review of an order of the Benefits Review Board, United States Department of Labor, filed by Tripe [sic] A Machine Shop, employer, and Mission Equities Insurance Group, insurance carrier. The insurance policy was issued pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. § 901, *et seq.*

BACKGROUND

Respondent Cordero [claimant], a 55-year-old welder, had worked in that capacity with various employers for over 30 years. He had had a chronic cough since the late sixties and a shortness of breath since 1970. For several years he had worked sporadically for Triple A in its ship repair shop. He renewed his work for this company in May, 1972, and continued into August of the same year, when he was laid off for lack of work. Triple A recalled him on October 16, 1972, but he was suffering from a chest cold and unable to return on that day. He did, however, return to work on October 17th and worked through October 19th when he was unable to work. He has not been gainfully employed since that time, although he has done some work around the house.

Subsequently, claimant sought recovery under the Act for total disability. A formal hearing was held before an Administrative Law Judge [ALJ] to resolve questions concerning the nature and origin of the claimant's pulmonary condition. Petitioners contend that: (1) claimant was not totally and permanently disabled; (2) if claimant was found to be totally and permanently disabled liability should not rest totally on petitioners, but rather be apportioned among all of claimant's previous employers; and (3) if claimant was found to be totally and permanently disabled and petitioners' liability was not reduced by apportionment, § 8 (f) of the Act, 33 U.S.C. § 908 (f), limited petitioners' responsibility to 104 weeks of benefits because claimant was partially permanently disabled when he began working for petitioner Triple A. The balance of claimant's

disability would be paid from a special fund pursuant to § 44 of the Act, 33 U.S.C. § 944.

In November, 1975, the ALJ found that claimant was permanently and totally disabled as a result of a pulmonary impairment which had been, at least, aggravated by his employment as a welder with the petitioner, Triple A, and, therefore, was entitled to benefits under the Act. Moreover, the ALJ held that petitioners' liability was not reduced by either an apportionment among claimant's previous employers or application of § 8 (f) of the Act. Petitioners appealed to the Benefits Review Board of the United States Department of Labor [Board]. The Board affirmed the decision of the ALJ.

SCOPE OF REVIEW

It is well settled that the Board's findings may not be disturbed unless they are unsupported by "substantial evidence on the record considered as a whole.", *Banks v. Chicago Grain Trimmers Ass'n.*, 390 U.S. 459, 467 (1968); *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508 (1951), or as stated in *Cardillo v. Liberty Mutual Ins. Co.*, 330 U.S. 469, 478 (1947), are "forbidden by the law." The reviewing court's function is exhausted when it appears that there is warrant in the evidence and a "reasonable legal basis" for the Board's award. *Cardillo, supra,* at 479; *Walker v. Rothschild Int'l. Stevedoring Co.*, 526 F.2d 1137 (CA9 1975); *Nardella v. Campbell Machine, Inc.*, 525 F.2d 46 (CA9 1975).

ISSUES

I.

Did the Board correctly affirm the ALJ's finding that claimant was permanently totally disabled by a pulmonary impairment arising out of his employment with Triple A?

Dr. Cosentino, a specialist in chest diseases, testified that he first saw the claimant on November 22, 1972, on a referral from another doctor, because of a positive tuberculin skin test. Dr. Cosentino's examination convinced him that claimant had never had tuberculosis and that his then chest involvement was in no way related to tubercle bacilli in his body. The claimant's history disclosed that he had had some coughing and wheezing dating back ten or fifteen years, but no evidence of allergies. After conducting rather elaborate tests, the doctor decided that claimant was suffering from obstructed airways and concluded that his condition was caused by cigarette smoking and exposure to oxides of nitrogen (welding fumes). As part of his examination, the doctor found that the claimant had a fiberous reaction in the small airways of the lung which was at one time reversible, but at the time of the examination, however, had reached what the doctor described as a plateau. Additionally, the doctor said that any type of physical exertion accelerates this condition and determined that the claimant's ability to work even in a sedentary job was now restricted to isolated days. The doctor also testified that claimant was permanently steroid dependent. On cross-examination, the doctor pointed out that there certainly was an acute aggravation of the claimant's condition in his last employment. However, he could not specifically put a percentage on the amount of the claimant's permanent condition which resulted from the inhalation of welding fumes. His final conclusion was that the basic cause of claimant's illness was cigarette smoking with exposure to welding fumes as an aggravating factor. Consequently, it was his opinion that the aggravation caused by the fumes during the last period of employment was a major factor in the claimant's permanent total disability.[1]

Petitioners' witness, Dr. Collins, an internist, after examining the claimant and reviewing the medical reports concluded that claimant suffered from chronic bronchitis and chronic obstructive lung disease. He felt that the claimant's bronchitis developed as a result of long standing cigarette smoking and prior infections. He conceded that exposure to fumes and odors of nitrogen in the course of his employment might cause temporary exacerbation of claimant's symptoms. Nevertheless, he said that the severe condition resulting in total disability developed during the period when claimant was not employed, and that the limited October, 1972, exposure could not lead to the claimant's substantial disability. Dr. Collins highlighted the physical work, as shown by the record, which claimant did around his home in replacing the roof and installing wallboard. It was his opinion that claimant's condition would have, under his work program, progressed substantially as it did, regardless of the claimant's activities or work. However, in the final analysis, he opined that inhaling welding

[1] "Q. Doctor, what effect, if any, did the three days of working exposure in October of 1972, have on Mr. Cordero's overall condition with regard to permanent disability?

A. This, as you know, was discussed at the deposition you took in my office, and my answer would be the same today as it was then. Certainly, there was an acute exacerbation of his symptomatology, so there certainly was acute aggravation." [R.T., p. 61, lines 13-19.]

fumes contributed, to some extent, to the permanent irritation or damage, but felt that this irritation was temporary and would abate.

Paul L. DeSilva, another doctor called by the petitioners, examined the claimant and expressed the opinion that many things other than his exposure to welding fumes affected the claimant's upper respiratory condition. He believed that the three subsequent days of work during October might have, at most, increased the claimant's respiratory tract problem for a few weeks.

Under the provisions of the Act, disability is an economic concept based upon a medical foundation. *Duluth, M. & I.R. Ry. v. U. S. Dept. of Labor,* 553 F.2d 1144, 1149 (CA8 1977); *Nardella v. Campbell Machine, Inc., supra,* at 49. The degree of disability cannot be measured by physical condition alone, but consideration must be given to the claimant's industrial history and the availability of the type of work he can do. *Atlantic Gulf Stevedores v. Director, etc.,* 542 F.2d 602 (CA3 1976).

The problem before us is succinctly stated in *Independent Stevedore Co. v. O'Leary,* 357 F.2d 812, 815 (CA9 1966), where the court said:

> "If an employee is incapacitated from earning wages by an employment injury which accelerates a condition which would ultimately have become incapacitating in any manner, the employee is incapacitated 'because of' the employment injury, and the resulting 'disability' is compensible under the Act."

Consequently, we must weigh the evidence to consider if it substantially supports the conclusion that the fumes aggra-

vated claimant's disability. The doctor testifying on behalf of claimant concluded that the fumes inhaled during the three day employment period aggravated his disability. The petitioners' doctor was unable to put "a value on the amount of injury which resulted from the last three days." and admitted that he really could not determine if welding fumes or smoking caused claimant's admitted medical problem.[2] Accordingly, even under the testimony of petitioners' doctor, the claimant should be viewed as suffering from a permanent total disability caused by a pulmonary impairment arising out of his employment as a welder.

We have here a pure question of fact which was resolved against the petitioners by the ALJ and the Board. Where the ALJ relies on witness credibility in reaching his decision, our court will interfere only where the credibility determinations conflict with the clear preponderance of the evidence. *NLRB v. Hospital & Institutional Workers,* ..... F.2d ..... (CA9, July 3, 1978, Sl. Op. at 2105); *NLRB v. Western Clinical Laboratory, Inc.,* 571 F.2d 457, 459 (CA9 1978), or where the determinations are "inherently incredible or patently unreasonable." *NLRB v. Anthony Co.,* 557 F.2d 692, 695 (CA9 1977). The duties of the ALJ under the National Labor Relations Act, the Act before the court in the above authorities, are similar, if not identical, to the duties of the ALJ under the Act before us. Consequently,

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[2] "Q. Is there any doubt in your mind that he received some irreversible damage to his lungs?

A. No. I would have to say that there is some probability that he did, but some of these are irritating to the extent, which I cannot be pefectly clear about, to the extent that he inhaled quantities of this, that part of this irration [sic] was temporary and goes away as any cold or respiratory irritation does, but that to some extent, *this contributed to a permanent irritation or damage.*" Vol. III, R.T., p. 99, lines 2-10. [Emphasis supplied.]

the decisions under the Labor Relations Act serve as a sound and authoritive guide to our review of the issues of fact in this case.

Considerable of petitioners' argument is devoted to a recitation of the factors other than welding fumes which arguably affected the claimant's pulmonary impairment. Conceding that the record supports this argument, nonetheless, we are bound by the rule that the presence of other contributing factors do not control the determination of applicability under the "aggravation rule." In fact, the "aggravation rule" is only relevant when other factors are present.

Petitioners' reliance on *Goins v. Noble Drilling Corp.*, 397 F.2d 392 (CA5 1968), is misplaced. A total of eleven medical reports relating to the claimant's continued disability were involved in *Goins*. The court characterized nine of the reports as indicating no disability, one was equivocal and one consisted of little more than a restatement of subjective complaints. In making an award to claimant, the Deputy Commissioner, the trier of fact under the Act prior to 1972, made no reference to any of the reports on the claimant who had by that time returned to work and was receiving continuing disability benefits. *Goins* is the type of a case where if the trier of fact had held otherwise, his findings might be deemed "inherently incredible or patently unreasonable" under the doctrine taught in *NLRB v. Anthony Co., supra,* at 695.

We conclude that there is substantial medical and other evidence to support the findings of the ALJ and the Board that the claimant was totally and permanently disabled by

a pulmonary impairment arising out of his employment as a welder.

II.

Next, petitioners argue that the ALJ erred in finding that Triple A, as the last employer under which the claimant was exposed to the injurious welding fumes, should be solely liable for his disability benefit. They concede that Triple A was the last employer where the claimant was exposed to the injurious fumes, but claim that their due process rights are violated by assessing full disability liability against the last employer.

The bellwether case on the subject is *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137, 145 (CA2 1955), *cert. denied* 350 U.S. 913. There, the court noted that administrative convenience made the last employer doctrine legally acceptable. The underlying rationale is that all employers will be the last employer a proportionate share of the time. In arriving at its decision, the *Cardillo* court fully examined the legislative history of the Act and held that this concept was allowable. The legal thinking behind the *Cardillo* decision has been upheld by the Second Circuit as recently as *General Dynamics Corp. v. Benefits Review Board,* 565 F.2d 208 (CA2 1977). We quote from that decision:

> "We see no reason now to depart from Judge Medina's searching and perceptive analyisis in *Cardillo*. The Supreme Court has recently emphasized that, '[W]e must bear in mind that considerations of *stare decisis* weigh heavily in the area of statutory construction. where Congress is free to change this Court's interpretation of its legislation.' *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 2070, 52 L.Ed.2d 707

(1977). *Cardillo has been the law of this Circuit for more than two decades; it has been followed by the Board; and we have found no contrary law in other circuits.* During this long period of consistent judicial application, Congress has not amended the Act to provide for a different rule." *Id.* at 212. [Emphasis supplied.]

We find no Ninth Circuit authority on the subject.

On a similar constitutional challenge to regulations under the provisions of related legislation [the Federal Coal Mine Health & Safety Act of 1969], 30 U.S.C. §§ 902 (f), 925, 932 (a) (c) (h) and 936, a three-judge court in *National Independent Coal Operators Ass'n v. Brennan,* 372 F.Supp. 16, 24 (DC DC 1974), *aff'd.* 419 U.S. 955 (1974), made short shrift of the constitutional challenge by saying that the provisions of the Act pursuant to which the regulations were promulgated did not deprive the operators of their property without due process of law or deny them equal protection of the law in violation of the Fifth Amendment and proceeded to say:

> "Furthermore, it does not violate due process of law to place full liability on one of several operators responsible for the pneumoconiosis." *Id.* at 24.

National Independent Coal Operators Ass'n. was summarily affirmed by the Supreme Court. The summary affirmance by the Supreme Court is an affirmance on the merits. *Hicks v. Miranda,* 422 U.S. 332, 343-44 (1975); *Ohio, ex rel Eaton v. Price,* 360 U.S. 246, 247 (1959). *See* C. Wright, Law of Federal Courts, § 108 (3d ed.) 1976. In *Doe v. Hoydson,* 478 F.2d 537, 539 (CA2 1973), *cert. denied sub. nom. Doe v. Brennan,* 414 U.S. 1096 (1973), it is said that the lower courts are

bound by summary decisions of the Supreme Court: "Until such time as the Court informs [them] that [they] are not."

True enough, the court in *National Independent Coal Operators Ass'n. placed* some emphasis on the fact that the claimant had been employed for *an accumulated period of one year* by the last operator on which liability was placed and, while here the claimant had been employed by Triple A for only the months of May, June, July, and until early August, 1972, and for three days in October, 1972. However, we do not think *National Independent Coal Operators Ass'n.*, in any way, dilutes the principles established in *Cardillo.* We hold that here there is a rational connection between the length of employment proven and the contribution to the development and aggravation of the disease.

In *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 14 (1976), Mr. Justice Marshall in an exhaustive opinion upholding, in general, the constitutionality of the Federal Coal Mine Health & Safety Act of 1969 recognized the summary affirmance in *National Independent Coal Operators Ass'n.* He noted that the Court's summary affirmance in that case did not foreclose the district court's inquiry into the unconstitutionality of §§ 411 (c) (3) and (4), subjects not there presented.

That a similar question was presented to the Supreme Court in *National Independent Coal Operators Ass'n.* is made clear by the jurisdictional statement filed with that Court by appellant under the heading "Questions Presented", page 3, from which we quote:

"5. Has the Secretary of Labor exceeded his authority under the Act by issuing regulations under which:

• • • • •

(b) the employer who last employed a miner for a cumulative period of one year is responsible for payment of black lung benefits, without apportionment of the costs of such benefits among the various other mine employers by whom the miner was employed; and . . ."

Not only is the question presented, but the constitutional issue is fully argued on pages 17 and 18 of the statement. The appellee fully responds to the appellant's argument on this issue on page 17 of his motion to affirm.

Unlike *Usery*, where the issue there before the Court had not been presented on the previous summary affirmance, a similar constitutional issue was clearly presented to the Supreme Court in *National Independent Coal Operators Ass'n.* and the district court was affirmed.

Because the onset of disability is a key factor in assessing liability under the last-injurious-exposure rule, it does not detract from the operation of this rule to show that the disease existed under the prior employer or carrier, or had become actually apparent, or had received medical treatment, so long as it had not resulted in disability, 4 A. Larson's Workmens' Compensation Law, § 95.21, nn. 88, 89, 90. True enough, the Larson Treatise treats cases mainly concerned with State Workmen's Compensation Acts, nonetheless, the same principles of law should and do apply. *Travelers Ins. Co. v. Cardillo, supra.* We quote from the Larson Treatise:

"In the case of occupational disease, liability is most frequently assigned to the carrier who was on the risk when the disease resulted in disability, if the employment at the time of the disability was of a kind contributing to his disease." *Id.* at § 95.21.

This rule is similar to the "last-injurious-exposure rule" in successive injury cases which places full liability on the carrier covering the risk at the time of the most recent injury that bears a casual relation to the disability.

We conclude that the *Cardillo* rule is sound and does not offend either the due process or the equal protection clauses of the Constitution.

III.

Finally, petitioners argue that claimant was partially permanently disabled and thus their liability was limited pursuant to 33 U.S.C. § 908 (f). They contend that the claimant's recovery be paid, in significant part, by the special fund established by 33 U.S.C. § 944. The issue here presented provides an interesting parallel with the last employer doctrine discussed under the previous assignment, because 33 U.S.C. § 908 (f) is the one provision in the Act which authorizes a type of apportionment of liability. That provision, however, was designed to perform a specific function and it does not come into play until certain specific prerequisites are met.

As we have earlier noted, the Act's overall coverage encompasses job-related incidents which result in the aggravation of underlying conditions and that the last employer is fully responsible for the aggravation occurring during that employment. The Supreme Court in *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198 (1949), commented on

the fact that under narrow circumstances, the rule might produce some damaging effects on the employment prospects of handicapped workers and called attention to the provisions of 33 U.S.C. § 908 (f). Recognizing that in the case of an employee with an "existing permanent partial disability" who has an injury which results in a greater degree of disability because of preexisting disability, the employer's liability will be limited and the remaining benefits will be paid by the special fund.

The provisions of § 908 (f) as applicable to the record before us are:

> "(f) Injury increasing disability: (1) If an employee receives an injury which of itself would only cause permanent partial disability but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subsequent injury: *Provided, however,* That in addition to compensation for such permanent partial disability, and after the cessation of the payments for the prescribed period of weeks, the employee shall be paid the remainder of the compensation that would be due for permanent total disability. Such additional compensation shall be paid out of the special fund established in section 944 of this title."

The ALJ found that at the time of the aggravation while in Triple A's employment, claimant did not have an existing permanent partial disability. He made this finding in the face of petitioners' contention that the pulmonary difficulties that predated claimant's employment with Triple A were disabling.

Admittedly, claimant had substantial breathing problems prior to his employment with Triple A. Nevertheless, he testified that he accepted whatever work was available in his trade until his condition was aggravated in October, 1972, to such an extent, that he was forced to leave what might be considered his life long employment. There is no evidence that the problems confronting claimant prior to the October incident in any way affected his earnings or interfered with his ability to perform his work. The four to six week interlude in claimant's employment between August and October, 1972, should not bar his claim. Although there may have been some deterioration in claimant's condition from August to October, when he was laid off, claimant was capable of working as a welder. The term "disability" as it is used in § 908 (f) includes both an employment-related disability and one unrelated to employment. *Lawson v. Suwannee Fruit & S.S. Co., supra.* To permit petitioners to hide behind their voluntarily imposed lay-off of claimant would provide them with an unearned benefit without in any way satisfying the objectives of § 908 (f).

In general, the Board is restricted to overturning an ALJ's legal conclusions and leaving his credibility determinations intact. *Cheney California Lumber Co. v. NLRB,* 319 F.2d 375 (CA9 1963); *Pittsburgh-Des Moines Steel Co. v. NLRB,* 284 F.2d 74 (CA9 1960). We quote from *Dillingham Corp. v. Massey,* 505 F.2d 1126 (CA9 1974):

> "However, Congress did not intend that all pre-existing conditions come under coverage by the Fund, but only those 'manifest' at the time of initial employment. [Citation omitted.] An underlying condition which is

not manifest to a prospective employer cannot qualify as a previous disability. [Citation omitted.] Thus, the key to the issue is the availability to the employer of knowledge of the pre-existing condition, not necessarily the employer's actual knowing of it. [Citation omitted.]" *Id.* at 1128.

In *Dillingham,* the claimant suffered a broken hip at an early age which resulted in a slightly shorter left leg and a minor limp. Nevertheless, he led a physically active adolesence and later worked as a ship fitter, a logger, and a marine machinist. His condition, as here, in no way prevented him from engaging in normal employment. In 1963, he fell while working as a machinist on a ship. We again quote from *Dillingham:*

> "He suffered an injury which *severely aggravated his pre-existing condition.* Further degeneration developed in 1966, culminating in a falling accident at his home in 1970, inability to continue employment, and a bleeding duodenal ulcer, all found to be caused by the *aggravated condition.*" *Id.* at 1128. [Emphasis supplied.]

It is obvious that the legal philosophy employed in *Dillingham* is fully applicable to the aggravation of the pre-existing condition before us. Here, there is nothing in the record to indicate that claimant's condition was known or even available to the petitioners. The court observed that the key element is "—what the employer has available to him when the hiring occurs, should he decide to take notice of it." *Id.* at 1128. True enough, there is evidence that claimant had symptoms of chest problems as early as 1967. Nonetheless, there is no evidence that his coughing affected

his ability to work or to fully perform the functions of his employment, nor is there any evidence Triple A was aware of claimant's chest problems. As we have already noted "[d]isability is an economic as well as a medical concept." *Nardella v. Campbell Machine, Inc., supra,* at 49.

While the petitioners may find some comfort in *Atlantic & Gulf Stevedoring, Inc. v. Director, etc.,* 542 F.2d 602 (CA3 1976), the fact remains that the case turned on the finding of the ALJ that the employer was fully aware of the medical problems of the decedent at the time of employment. Additionally, the court held that the finding of the ALJ was supported by substantial evidence in the record as a whole and that the Board's order modifying the decision and order of the ALJ should be set aside. Here, as we have already noted, the ALJ made no such finding, nor is there any evidence in the record on which such a finding could be grounded. We hold that 33 U.S.C. § 908(f) has no application to these facts.

CONCLUSION

Finding no error, we deny the petition for review and affirm the order of the Benefits Review Board.

REVIEW DENIED; ORDER AFFIRMED.

No. 78-863

In the Supreme Court of the United States

OCTOBER TERM, 1978

TRIPLE A MACHINE SHOP and MISSION EQUITIES INSURANCE GROUP, PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, and OCTAVIO CORDERO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

The judgment of the court of appeals in this case was entered on August 29, 1978 (Pet. 2; Pet. App. C). Petitioners did not seek rehearing in the court of appeals and did not obtain an extension of time within which to file a petition for certiorari. The time provided by 28 U.S.C. 2101(c) within which

to file a petition for certiorari therefore expired on November 27, 1978. The petition was not filed until November 29, 1978. The time limit provided by Section 2101(c) is jurisdictional. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942). It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1979

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of the

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Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Cases

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JURISDICTION

Jurisdiction on the Writ of Certiorari is limited to the considerations as set out in Rule 19 of the Supreme Court of the United States. The holding of the Court of Appeals for the Ninth Circuit turned on the finding that there was nothing in the record to indicate that the claimant's condition was known or even available to the employer. This holding is consistent with the decisions rendered by the Courts of Appeal for the Third Circuit, Fifth Circuit, and the District of Columbia Circuit which defines disability under the new §8(f) as encompassing a serious physical disability such that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of employment-

related accident and compensation liability.

STATEMENT OF THE CASE

Prior to the hearing in this case, the Administrative Law Judge granted a motion by the Petitioner to join as Respondents eighteen of the Claimant's former employers. At the hearing of April 9, 1975, the Administrative Law Judge dismissed two of the Claimant's former employers; the remaining sixteen Respondents made no appearance at the hearing. Petitioners did not appeal the Order of Dismissal.

Respondent Octavio Cordero worked as a welder for approximately 30 years. During this period, he was exposed to fumes in enclosed areas. The Administrative Law Judge found that the Claimant was totally and permanently disabled as the result of the

cumulative effect of breathing fumes in connection with his employment. Respondent Cordero worked for Petitioner from May, 1972 to August, 1972 and again from October 17, 1972 to October 19, 1972. He was unemployed during the interim period. The Benefit's Review Board upheld the decision of the Administrative Law Judge on the basis that there was nothing in the record to indicate that the petitioning employer was aware of the Respondent's breathing condition at the time he was hired either in May, 1972 or October, 1972. The United States Court of Appeals, Ninth Circuit, denied the Petition for Review and affirmed the Order of the Benefit's Review Board, noting specifically that there was nothing in the record to indicate that Respondent's condition was known

or even available to the Petitioners.

ARGUMENT

I

The Writ should be denied since the holding of the Court of Appeals, Ninth Circuit is not in conflict with the decision of the other Court of Appeals on the same matter. In affirming the Order of the Benefit's Review Board, the Court of Appeals for the Ninth Circuit quoted from Dillingham Corp. v. Massey, 505 F.2d 1126 (CA9 1974) as follows:

> "However, Congress did not intend that all pre-existing conditions come under coverage by the Fund, but only those 'manifest' at the time of initial employment. (citation omitted). A condition which is not manifest to a prospective employer cannot qualify as a previous disability. (citation omitted). Thus, the key to the issue is the availability to the employer

> of knowledge of the pre-existing condition, not necessarily the employer's actual knowledge of it. (citation omitted)."
> ID. at 1128.

The Ninth Circuit then noted that here, there is nothing in the record to indicate that Claimant's condition was known or even available to the Petitioners. While there was evidence that the Claimant had symptoms of chest problems as early as 1967, there was no evidence that his coughing affected his ability to work or to fully perform the functions of his employment.

In affirming the Order of the Beneift's Review Board, the Court of Appeals for the Ninth Circuit also referred to Atlantic and Gulf Stevedoring, Inc. v. Director, etc., 542 F.2d 602 (CA 3, 1976) and noted

specifically that in that case the employer was fully aware of the medical problems of the decedent at the time of the employment. The Court distinguished Atlantic and Gulf Stevedoring, Inc. v. Director, etc. (supra) again noting that there was no finding in the record of the instant case that the employer was aware of any medical problems of the decedent at the time of the employment.

The Petitioners state as a reason for granting the Writ that the Decision of the Court of Appeals for the Ninth Circuit was further in conflict with C & P Telephone Telephone Co. v. Director, Office of Workers' Compensation Programs, 564 F.2d 503 (D.C. Cir. 1977). In that case, the Court stated the following:

> "To summarize, the

> term 'disability' in new §8(f) can be an economic disability under §8(c)(21) or one of the scheduled losses specified in §8(c)(1)-(20), but it is not limited to those cases alone. 'Disability' under new §8(f) is necessarily of sufficient breadth to encompass those cases, like that before us, wherein the employee had such a serious physical disability in fact that a cautious employer would have been motivated to discharge the handicapped employee because of a greatly increased risk of employment-related accident and compensation liability."

In granting the employer's Petition, the Court noted specifically that the record supported a finding that the Claimant's back problems "were known to the employer." Consistent with the decision of the Court of Appeal for the D.C. Circuit, the Court of Appeals for the Ninth Circuit has based its finding on the fact that

there is nothing in the record to indicate that the Claimant's condition was known or even available to the employer at the time of the hire. There is nothing in the record to reflect that the Court of Appeals for the Ninth Circuit based its decision on an economic concept of disability. Since there is no conflicting law among the Circuit Courts, the Petition for Writ of Certiorari should be denied.

II

Petitioner's request that this Honorable Court take a fresh look at the "last carrier" rule which was established in Travelers v. Cardillo, 225 F.2d 137 (2d CIR. 1955), CERT. denied 350 U.S.913, 100 L.Ed 800 76 S.Ct.196. It should be noted that Petitioner's did not appeal the Order of Dismissal of the Respondent's other

employers and their workers' compensation carriers. These former employers are parties who have an interest in this action and are not presently before this Court because of the Petitioner's failure to object to their dismissal. The Respondent therefore submits that this case is not a proper one for review of the"last carrier" rule.

As noted in the opinion of the Court of Appeal for the Ninth Circuit, the Second Circuit recently reviewed the Cardillo decision in General Dynamics Corp. v. Benefits Review Board, 565 F.2d 208 (CA2 1977) and saw no reason to depart from "Judge Medina's searching and perceptive analysis of the 'last carrier' rule." The General Dynamics Corp. Court stated as follows:

"Cardillo has been

> the law of this Circuit for more than two decades; it has been followed by the Board; and we have found no contrary law in other circuits. During this long period of consistent judicial application, Congress has not amended the Act. to provide for a different rule." (emphasis supplied).

On Page 8, Petitioner's refer to a compensation rate of $396.78 per week. It should be noted that the date of injury, October 19, 1972, is prior to the effective date of the amended Longshore and Harborworkers Act. The liability for the Petitioner in this case is $70.00 per week. While percentage increases are allowable, under §10(h)(1) of the Amended Act, the increases over the $70.00 base are reimburseable from the Special Fund. Further, the Petitioner's state that the liability is the result of three

day's of exposure with its employer. Again, it should be noted that the period of employment with the employer was sporadic up to 1972, for the period of May, 1972 to August, 1972 and again for the period October 17, 1972 through October 19, 1972. During that period of employment, the Claimant incurred an injurious exposure to fumes, the cumulative effect of which was permanent damage to his lungs. We submit that it does not violate due process of law to place full liability on one of the several employers responsible for the Claimant's lung condition.

CONCLUSION

For the reasons as stated above, Respondent respectfully prays that the Writ of Certiorari be denied.

Dated, San Francisco, California,

December 28, 1978.

Respectfully submitted,

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SERVICE SHEET

BRB No. 76-113: Octavio Cordero v. Triple A Machine Shop and Mission Equities Insurance Group (Case No. 75-LHCA-153)

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